PUBLIC PROSECUTOR

v.

BAHAROM BAKAR & ANOTHER CASE

HIGH COURT MALAYA, KUANTAN
SHAIK DAUD ISMAIL J
[CRIMINAL TRIAL NOS. 4 & 1 OF 1984]
3 APRIL 1984

CRIMINAL LAW AND PROCEDURE: *Application for revision - Orders of committal - Amendments to the Dangerous Drugs Act - Whether affects the jurisdiction of Sessions Court - Offences committed prior to the amendment - Attorney-General's discretion as to the choice of forum - Criminal Procedure Code, s. 323 - Federal Constitution, Article 145(3).*

STATUTORY INTERPRETATION: *Whether s. 30(1) has relevance to the issue of jurisdiction - Pertinent date - Whether date of actual trial, date of offence or charge - Interpretation of statutes - Interpretation Act 1967, s. 30(1).*

This is an application by the learned DPP under s. 323 Criminal Procedure Code for the revision of 2 orders of committal by the Sessions Court in Kuantan SA. 66 of 1981 and SA. 38 of 1982. Both accused persons face offences for trafficking drugs. Their cases were not heard due to inordinate delay and various unnecessary postponements. Subsequent to their charge, the Dangerous Drugs (Amendment) Act 1983 (Act A553/83) came into operation. The Sessions Court in Kuantan ordered the committals to the High Court on the ground that it no longer had jurisdiction to try the cases being offences under s. 39B (1) Dangerous Drugs Act 1952 as amended. The learned DPP contended that the Sessions Court President had erred in law in making the committal orders as the sessions Court has jurisdiction to try the cases. Further he contended that under s. 30(1) Interpretation Act 1967, the jurisdiction is retained. Yet further, he contended that there is jurisdiction because by virtue of Art. 145 (3), Federal Constitution, the Attorney-General has the discretion to choose the forum to try the cases.

Held:

[1] As a result of A553/83, the Sessions Court no longer has jurisdiction to hear cases under s. 39B(1) of the Dangerous Drugs Act 1952 - even where those offences were committed prior to the coming into force of the amending Act.

[2] Section 30(1) Interpretation Act 1967 has no relevance to the issue of jurisdiction after the amending Act as the section refers to repeals of existing law and not to its amendments.

[3] In interpreting whether any particular Court has jurisdiction or not to try cases, the pertinent date to be considered is the date of the actual trial and not the date of the offence or charge.

[4] In interpreting statutes, it is pursuant that a statute does not create new jurisdiction or enlarge existing ones, and express language is required if an Act is to be interpreted as having that effect.

[5] The Attorney-General does not have powers under Art. 145(3) Federal Constitution to choose the forum to try a case under s. 39(B)1 of the Dangerous Drugs Act 1952 for the Act has clearly expressed that the High Court shall have exclusive jurisdiction.

[Orders for committal stayed.]

Cases referred to:
PP v. Lim Shui Wong & Ors. [1979] 1 MLJ 65
PP v. Mohd. Ismail s/o Mohd. Sultan [1983] 1 CLJ 319

Legislation referred to:
Criminal Procedure Code, s. 323
Dangerous Drugs Act 1952, s. 39B(1)
Federal Constitution, art. 145(3)
Interpretation Act 1967, s. 30(1)

Other source referred to:
Maxwell on Interpretation of Statutes, 12th Edn.

JUDGMENT

Shaik Daud Ismail J:

This is an application by the learned DPP for me to exercise my revisionary powers under s. 323 of the Criminal Procedure Code against the order of committal by the Sessions Court in Kuantan SA. 66 of 1981 and SA. 38 of 1982. Both cases were heard together as both these cases relate to the same issue, and both accused persons face offences for trafficking drugs.

From the records before me the background of SA. 66 of 1981 is as follows:

The accused, Baharom b. Bakar, was first charged in the Magistrate's Court on 8 November 1980 for an offence of possession of cannabis under s. 6 of the Dangerous Drugs Act, 1952. After a few mentions on 27 November 1980 the case was finally set down for hearing on 27 August 1981. All these while the accused was remanded in custody. The record does not reflect that bail was either offered or opposed but presumably it must have been opposed because at an entry of 27 November 1980 it is stated by the prosecuting officer that he would get a certificate from the learned DPP to oppose bail. Finally on 11 December 1980 when accused was produced the certificate opposing bail under s. 41B (1)(c) of the Dangerous Drugs Act 1952 was tendered. On the appointed date of hearing that is 27 August 1981 the record merely showed as follows:

> P.O. ASP Keshab. Accused produced.
>
> To 10 September 1981 (M) R/E 3 September 1981.

No reasons were recorded as to why the case did not proceed on that day and as to why it had to be set down for mention only on 10 September 1981. However, the entry as recorded on 10 September 1981 appeared to shed some light as on that day the prosecuting officer tendered an amended charge for trafficking under s. 39B(1)(a) of the Dangerous Drugs Act 1952. The learned Magistrate then ordered the case to be transferred to the Sessions Court as he clearly had no jurisdiction to try an offence under s. 39B. Accordingly, the accused was produced in the Sessions Court on 24 September 1981, and the case fixed for hearing in the Sessions Court on 19 and 20 July 1982.

That, unfortunately, did not seem to be the end of the matter. For reasons which are not apparent in the records the accused was produced before the learned President, Sessions Court on 17 June 1982, when for the first time a defence Counsel, Mr. Panir Selvam, applied to discharge himself. On the application being granted the case was postponed and this time set for hearing from 30 May 1983 to 1 June 1983, that is, almost one year later. As the accused had been in custody since 1980, I would have expected an earlier date for hearing

could and should have been given. Be that as it may, on the appointed day for hearing, that is, 30 May 1983, the case still did not get off the ground apparently because the accused did not have a Counsel and consequently requested for a postponement. This the learned President, Sessions Court granted and re-set the case to 27 and 28 February 1984 for hearing.

On 27 February 1984 a new defence Counsel, one Mr. Mura Raju, attempted to apply for postponement but was unsuccessful. By this date the Dangerous Drugs (Amendment) Act, 1983 (Act A553) had come into effect. This Act A553 became operational with effect from 14 April 1983 (except two sections which were made to have retrospective effect from 1977). Act A553 made several amendments to the Dangerous Drugs Act 1952 notably ss. 39A, 41 and 41A(1). As a result of this and after hearing arguments the learned President, Sessions Court arrived at the conclusion that he no longer had jurisdiction to try offences under s. 39B notwithstanding that the offence was committed prior to the coming into effect of the amendments. Accordingly, he ordered the accused to be committed for trial in the High Court.

The position of the accused, Jusoh b. Saamah, in SA. 38 of 1982 appears to be not much better than SA. 66 of 1981. He was first charged in the Sessions Court on 15 September 1982 and the case fixed for hearing on 17 and 18 February 1983. On the appointed day the case was postponed for no apparent reason to 19 and 20 May 1983. On 19 May 1983 again for reasons not recorded (if any) the case was postponed to 22 and 23 August 1983. On 22nd August 1983 on the application of the defence Counsel the case was again postponed to the 5 and 6 December. Similarly, on 5 December 1983 on the application of learned Counsel, the case was postponed to 19 and 20 March 1984. It was finally on 19 March 1984 that on the application of the defence Counsel the learned President, Sessions Court ordered the accused to be committed for trial. All these while no one seems to be concerned that the accused was remanded in prison.

I deliberately set out the background of these 2 cases in detail to show that but for the inordinate delay and the various unnecessary postponements, these 2 cases would have been disposed of long before the amendments came into operation and both the accused would not be facing this legal problem now. As a result, the accused Baharom bin Bakar, had been in custody for nearly four years and Jusoh bin Saamah for 1½ years, without knowing when their fate will finally be decided. All of this happened through no fault of their own. For myself, I find it most depressing and indeed oppressive that the liberty of a subject who, mind you, is presumed to be innocent until proven guilty, is being denied. Both the accused were bandied about like tennis balls just to suit certain quarters.

Here I would like to remind Magistrates and Presidents, especially when they are dealing with criminal cases in which the accused persons are in custody, to constantly keep in mind the well-known and often repeated principle that justice delayed is justice denied. When faced with such cases they should dispose of them as speedily and as expeditiously as is possible.

Having cleared that off my chest, let me now consider the legal issue faced by these two cases. It is the contention of the learned DPP and somewhat supported by learned defence Counsel in SA 66 of 1981, that the learned President, Sessions Court erred in law when he ordered the committal to the High Court as he, the learned President Sessions Court still has jurisdiction to hear the two cases despite the amendment of sub-section (1) of s. 41A of the Dangerous Drugs Act, 1952. The learned Counsel in SA. 38 of 1982 seems to think otherwise. He is of the view that since the amendment aforementioned, the learned President Sessions Court no longer has the jurisdiction.

Act A553 made several amendments to the principal Act. For the purpose of these two matters before me we are not concerned with all the amendments except two which are pertinent to the present matter. Act A553 by s. 14 amended s. 39B(2) of the Principal Act by deleting the words "or imprisonment for life and shall, if he is not sentenced to death also be liable to whipping." By this amendment to s. 39B legislature provided for a mandatory death sentence upon conviction in all cases of trafficking in contravention of s. 39B of the Act. In other words, the amendment took away the discretion given by the principal Act before its amendment. Before the amendment when such cases are tried in the Sessions Court that Court could only impose the alternative sentence of life imprisonment. After the amendment it follows, therefore, that such cases can no longer be tried in the Sessions Court as that Court never had the jurisdiction to impose the death penalty. As a result, a consequential amendment had to be made in order to make it clear and unambiguous. Hence, sub-section (1) of s. 41 and sub-section (1) of s. 41A of the principal Act were accordingly amended by Act A553, in order to give exclusive jurisdiction to the High Court. These amendments came into effect from 14 April 1983, the date of its *gazette* notification. For offences committed after this date no difficulty arose as the Act A553 made it very clear that such cases can only be tried in the High Court. Cases which present difficulty as to the venue of trial are those alleged to have been committed before the operational date of the two amendments as these two present cases.

The question to be decided essentially is whether, as a result of the Act A553 the Sessions Court has jurisdiction to try offences under s. 39B of the Act where those offences were alleged to have been committed prior to the coming into force of the amendments, that is to say prior to 14 April 1983.

Sub-section (1) of s. 41 before its amendment reads as follows:

> 41(1) A Sessions Court shall have jurisdiction to try all offences under this Act and to impose the full punishment or penalty provided for any such offence by this Act or by any regulations made thereunder, except the penalty of death.

After amendment by Act A553 it now reads:

> 41(1) A Sessions Court or a Magistrate's Court presided over by a Magistrate of the First Class shall have jurisdiction to try any offence under this Act, except an offence under s. 39B, and power to impose for any offence so tried the full punishment or penalty provided for that offence by this Act or by any regulations made thereunder, other than, in the case of a Magistrate's Court, imprisonment exceeding five years.

Sub-section (1) of s. 41A before its amendment reads:

> 41A(1) Where in any case in respect of an offence under this Act is required by the Public Prosecutor to be tried by the High Court, the accused person shall be produced before the appropriate Subordinate Court which shall, after the charge has been explained to him, transmit the case to the High Court without holding a preliminary inquiry under Chapter XVII of the Criminal Procedure Code, and cause the accused person to appear or be brought before such Court as soon as may be practicable.

The amendment reads as follows:

> Sub-section (1) of s. 41A of the principal Act is amended by inserting the words 'is triable exclusively by the High Court or' immediately after the words 'under this Act'.

The learned DPP contended that by virtue of s. 30(1) of the Interpretation Act 1967, the Sessions Court still has jurisdiction to hear such cases. With due respect, I do not think that applies here. Section 30(1) of the Interpretation Act 1967 refers to repeals of existing

laws whereas here we are not concerned with the repeal of an existing law but merely with its amendments. Act A553 did not repeal the Dangerous Drugs Act 1952 but merely made certain amendments.

On going through the whole of Act A553 it is clear that it did not make provisions for transitional cases. Unlike Act A426 which is also an Act making several amendments to the principal Act, the legislature deemed it fit to make provisions for pending cases but Act A553 remained silent as far as pending cases are concerned. By this silence does it mean that it is the intention of the legislature to exclude the jurisdiction of the Sessions Court even in respect of offences under s. 39B alleged to have been committed prior to the operational date of the amendments?

I am of the considered view that this silence is deliberate and by the amendment of s. 41A (1), it is the intention of the legislature to exclude the jurisdiction of the Sessions Court from hearing offences under s. 39B after the operational date even in cases alleged to have been committed prior to the operational date. If it were to be otherwise, it would be reasonable to expect that provisions would have been made for pending cases as was clearly and expressly made in A426. I can find nothing in Act A553 either expressly or by implication, which reserved a residual or provisional jurisdiction to the Sessions Court after the operational dates of the amendments.

Jurisdiction of any particular Court must necessarily mean its current power. It follows from this that in order to determine whether any particular Court has or has no jurisdiction, the pertinent date to be considered is the date of the actual trial and not the date of the offence or the date of the charge. Can it be said therefore, that at the date of the trial of these two cases, the Sessions Court has or still has the power to try offences under s. 39B of the Dangerous Drugs Act? The Act giving jurisdiction must expressly and unambiguously state the power. I am of the view that it cannot be presumed that in amending ss. 41 and 41A(1) legislature intended only to apply them to cases alleged to have been committed after the amendments come into effect. If that is so, it would have said so and would have left some residual jurisdiction to the Sessions Court. *Maxwell on Interpretation of Statutes*, 12th Edn. under the heading Presumption Against Creating New And Enlarging Existing Jurisdiction at p. 159 states:

> It is also presumed that a statute does not create new jurisdiction or enlarge existing ones, and express language is required if an Act is to be interpreted as having this effect.

In the absence of such express and unambiguous language in Act A553, to hold that after 14 April 1983 the Sessions Court still has or still remains jurisdiction to try offences under s. 39B(1) of the Dangerous Drugs Act even where the offences were alleged to have been committed before 14 April 1983, would tantamount to enlarging the current jurisdiction or creating new ones for the Sessions Court and would be contrary to the express intention of Act A553.

It was also the contention of the learned DPP that since the Attorney-General in exercising his discretion under Article 145(3)of the Constitution decided to choose the Sessions Court as the venue of trial, this Court should or could not interfere with this discretion and he rightly quoted *PP v. Lim Shui & Ors.* [1979] 1 MLJ 65 where at p. 67 Suffian LP (as he then was) said:

> In our view the words 'institute, conduct' in Article 145(3) are wide enough to confer on the Attorney-General unfettered discretion to choose in which Court, a higher or a lower Court, to bring persons charged under s. 39B(1) of the Dangerous Drugs Ordinance.

As such, the learned DPP is of the view that the Court cannot question this discretion. I fully agree with this, before ss. 41 and 41A(1) were amended. Surely it cannot be suggested that after the amendment of ss. 41 and 41A(1) as it is now, the Attorney-General can still choose the venue of trial of offences under s. 39B. In view of the amendment the Attorney-General can no longer exercise his discretion to choose the venue of trial for the law has clearly expressed that "the High Court shall have exclusive jurisdiction."

It was also contended that to have the accused persons tried in the High Court now would place them to a possible penalty of greater peril. In other words, the High Court could still impose the death penalty whereas if they were tried and convicted in the Sessions Court that Court could only sentence them to life imprisonment and whipping. I am of the view that this is not in issue at this stage. Here we are more concerned with jurisdiction rather than sentence. In determining sentence in such cases, other matters had to be taken into consideration e.g. Article 7(1) of the Constitution (See *PP v. Mohd. Ismail s/o Mohd. Sultan* [1983] 1 CLJ 319).

For these reasons, it is my judgment that by virtue of ss. 41 and 41A(1) amended by Act A553 jurisdiction to hear all offences under s. 39B of the Dangerous Drugs Act 1952, even where the offence were alleged to have been committed before the date of coming into effect of the amendment, is exclusively conferred on the High Court, and the Sessions Court can no longer exercise jurisdiction, and the Attorney-General can no longer exercise his discretion under Article 145(3) of the Constitution to choose the venue of trial for such cases. The learned President Sessions Court, therefore, rightly ordered both these cases to be committed for trial in the High Court as he no longer enjoys the privilege of hearing such cases. Therefore, I order that these two cases be tried in the High Court.

Also found at [1984] 2 CLJ 188